IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 428

PENNSYLVANIA WATER & POWER COMPANY AND SUSQUEHANNA TRANSMISSION COMPANY OF MARYLAND, *Petitioners,*

vs.

FEDERAL POWER COMMISSION, AND CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE AND PUBLIC SERVICE COMMISSION OF MARYLAND, INTERVENORS, *Respondents.*

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PENNSYLVANIA PUBLIC UTILITY COMMISSION, *Petitioner,*

vs.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF INTERVENOR-RESPONDENT CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE IN OPPOSITION

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit filed July 3, 1951, is not

yet officially reported, but appears at Record (R.), Vol. XVIII, p. 46. The Dissenting Opinion of Miller, Circuit Judge, filed October 4, 1951, which has not yet been officially reported, appears in Appendix B to the Petition in No. 428.

The Opinions and Orders of the Federal Power Commission (FPC) affirmed by the Court of Appeals have not yet been published. They appear in the Record as follows: (1) Opinion No. 173 and Order of January 5, 1949, reducing rates of Pennsylvania Water & Power Company (Penn Water) — R., Vol. XVI, pp. 39-176, 177-191; (2) Opinion No. 173-A and Order of February 28, 1949, denying Petition for Rehearing on Opinion No. 173 and Order of January 5, 1949 — R., Vol. XVI, pp. 372-388; (3) Order of March 17, 1949, denying Petition for Rehearing on Opinion 173-A and Order of February 28, 1949 — R., Vol. XVI, pp. 414-415; (4) Order of October 27, 1949, prescribing new rate schedules for Penn Water — R., Vol. XVII, pp. 46-71; and (5) Order of December 15, 1949, denying Petition for Rehearing on Order of October 27, 1949 — R., Vol. XVII, pp. 94-99.

JURISDICTION

Petitioners have invoked the jurisdiction of this Court under U. S. C., Title 28, Sec. 1254(1), and Sec. 313(b) of the Federal Power Act (U. S. C., Title 16, Sec. 825 l (b)).

PRELIMINARY STATEMENT

The Petitions allege actually three questions.

One question is whether a "licensee," under Part I of the Federal Power Act,[1] which is also a "public utility".

[1] U. S. C. A. Title 16, Part I, Secs. 791-823; Part II, Secs. 824-824h.

under Part II of that Act, is subject to rate regulation under Part II. Petitioner Penn Water denies this. Certiorari on this issue has already been denied by this Court.[2] This issue presents no conflict between Circuits.

A second question is whether, in connection with sales of combined steam and hydro electricity as "firm" power provided by an interconnected and physically integrated interstate electric power system, FPC may exercise jurisdiction over the fluctuating "unfirm" hydro component of this service if that component is generated and sold in a single State. The Pennsylvania Public Utility Commission (PUC) denies this. Its Petition on this issue ignores the facts of the interstate system's physical operation as established by the record and found by the Court below. This issue also presents no conflict between Circuits.

The remaining question — the "primary issue" — is alleged by both Petitioners, Penn Water and PUC, to be whether FPC may compel utilities under its jurisdiction to perform acts which — absent such order — would violate the Federal anti-trust laws. This question was not presented below because, *in this case*, FPC made no such order. It ordered as a tariff for Penn Water's services to Consolidated Gas Electric Light and Power Company of Baltimore (Consolidated) the *rate* and *service* provisions of a contract between those companies, at the same time reducing rates to Consolidated approximately $1,700,000 out of an overall reduction of $2,000,000. These rate and service provisions, so ordered, have never been held to be illegal. Two paragraphs, Articles IV and V, of that contract were, however, later found by the Fourth Circuit

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[2] *Safe Harbor Water Power Corporation v. Federal Power Commission* (1950), 339 U. S. 957 (C. A. 3, March 22, 1949, 179 F. 2d 179).

illegally to restrict Penn Water's contracts with third parties and its physical expansion. That Court thereupon invalidated the entire contract — the legal provisions with the illegal. Petitioners, and the Dissent below by Miller, J., contend that invalidation of the entire contract, *qua* private contract, automatically annulled the tariff which FPC had prescribed by adopting only the valid rate and service provisions of the contract. This alleged issue hangs on this *non sequitur*.

The Court below correctly found that the Petitioners had not exhausted their administrative remedies to change the tariffs by proper procedure before FPC instead of by their present effort to annul those tariffs and to vacate the rate reduction by collateral attack. This finding correctly disposed of the case. But the Court below went further and discussed the general relationship between the Federal Power Act and the Federal anti-trust laws. In a subsequent and different case, involving a different contract and opposite controlling facts,[3] the Fourth Circuit differed from the reasoning of the Court below in the latter's discussion of such relationship. The different reasoning *in that case*, possibly material *in that case*, may present sound grounds for granting certiorari *in that case*. Its difference from reasoning in this case, not material to the decision of this case, does not establish grounds for certiorari *in this case*. It presents a question which is not ripe for determination by this Court *at this time* on *this record*.

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[3] *Consolidated Gas Electric Light and Power Company of Baltimore and Public Service Commission of Maryland v. Pennsylvania Water & Power Company and Pennsylvania Public Utility Commission*, USCA 4th, January 3, 1952, not reported. Copies of this Opinion have been filed by Petitioners with this Court.

THE QUESTIONS AS PRESENTED BY PETITIONERS

1. The question presented by Penn Water *alone* is its "Questions Presented" No. III (Penn Water Pet., No. 428, p. 17). This question is whether, as an acknowledged "licensee" under Part I of the Federal Power Act, Penn Water is subject to rate regulation under Part II of that Act as an acknowledged "public utility" under such Part II. This issue *was* submitted to and passed upon by the lower Court.

Under substantially identical facts and upon identical argument, the Third Circuit held that a "licensee" under Part I of the Federal Power Act is also subject to rate regulation under Part II of that Act if such licensee is also a Part II "public utility." *Safe Harbor Water Power Corp. v. FPC* (1949), 179 F. 2d 179. And, on an argument identical with that now presented by Penn Water, certiorari was denied. (1950) 339 U. S. 957. This question was adequately disposed of by Part II of the Opinion of the Court below (R., Vol. XVI, p. 57), and will not be further argued herein. This issue presents no conflict between Circuits, nor ground for the granting of certiorari.

2. The question presented by PUC *alone* is its "Questions Presented" No. I (PUC Pet., No. 429, p. 19). This question, *as so presented*, is whether FPC has jurisdiction over energy "produced in Pennsylvania and thereafter *sometimes commingled*" with interstate energy and sold to Pennsylvania customers. This issue also *was* submitted to and passed upon by the lower Court which found the issue to be based on a factually incorrect contention (repeated at Penn Water Pet., No. 428, p. 14) that "the services of Penn Water to the three Pennsylvania electric utilities (are) rendered by Penn Water entirely within Pennsylvania * * *." This contention is contrary to the factual record

before FPC, to the factual findings of FPC, and to the affirmance of those findings by the Court below. It ignores Penn Water's dependence on interstate system operations to firm up its own widely fluctuating output which is primarily dependent upon an extremely varied river flow. It likewise abandons the basis of Penn Water's attack on FPC jurisdiction over this service which it made before FPC, viz., that Penn Water's sales to its Pennsylvania customers were "*joint*" sales and that FPC has no statutory jurisdiction over *joint* tariffs (R., Vol. XVI, pp. 56-57). This question asks this Court to substitute its judgment for that of the Court below and for that of the FPC on complicated technical issues of fact. It was adequately disposed of by Part III of the Opinion of the Court below (R., Vol. XVI, p. 61) and will not be further argued herein. It provides no basis for the granting of certiorari.

3. The question presented by *both* Penn Water and PUC is described by Penn Water as follows (Penn Water Pet., No. 428, p. 2):

> "The primary issue raised by this petition is whether the FPC (in the absence of any express authority in the Federal Power Act such as is found in certain other Federal regulatory statutes) may compel electric utilities to perform, and may base its rate orders upon continued performance of, contracts which have been adjudged by the courts to violate Federal antitrust laws, public policy and the laws of the utilities' state of incorporation."

This issue is in effect a consolidation of Penn Water's "Questions Presented" Nos. I and II (Penn Water Pet., No. 428, p. 17). It is duplicated in the Petition of Pennsylvania Public Utility Commission and constitutes that Commission's "Questions Presented" Nos. II and III (PUC Pet., No. 429, p. 19). It was not passed upon by the Court below

or by FPC. Neither was it passed upon by the Fourth Circuit in the Baltimore Contract Case.[4]

This question, as so framed, distorts the issue that was tried below in the following respects:

a. The question distorts the orders of FPC here sought to be vacated.

FPC did not compel performance of any illegal contract provision. The Order of FPC establishing rates, which is here under attack, appears in full in R., Vol. XVII, pp. 46-71. After first reducing the tariff rates, the Commission's order provided that:

> "All other provisions of the aforementioned contracts, *in and of themselves lawful* prescribing or defining the *power, energy and transmission services to be furnished*, or any classification, practice, regulation or rule affecting such services, which several provisions are incorporated herein by reference, shall be observed and be in force." (R., Vol. XVII, p. 62. Emphasis added.)

This order obviously prescribes observance only of contract provisions which are "in and of themselves lawful" and which also "prescribe or define" the "services to be furnished." It does not compel compliance with either Article IV or Article V of the Baltimore Contract, which Articles — and which Articles *alone* — were subsequently held "in and of themselves" unlawful by the Fourth Circuit.[5] Article IV imposed restrictions on Penn Water's contracts with third parties. It did not prescribe or define the services to be furnished, and therefore compliance with it was not prescribed by the above order of FPC. Article V placed

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[4 & 5] *Pennsylvania Water & Power Company and Pennsylvania Public Utility Commission v. Consolidated Gas Electric Light and Power Company of Baltimore and Public Service Commission of Maryland* (Sept. 30, 1950), 184 F. 2d 552, Cert. Den., 340 U. S. 906.

restrictions on the physical expansion of Penn Water. It likewise did not prescribe or define the services to be furnished, and compliance with it was likewise not ordered by FPC.

b. The question assumes — but does not articulate — the *non sequitur* that if an entire contract between utilities, subject to FPC jurisdiction, is stricken down in a collateral action between private parties, because it contains two invalid restrictions, FPC cannot prescribe as a rate-schedule tariff the valid *rate* and *service* provisions of the contract divorced from such restrictions. Based on this *non sequitur*, Petitioners now argue that because the valid portions of the Baltimore *Contract* fell with the invalid under the Fourth Circuit's Opinions of Sept. 30, 1950 and January 10, 1951, the tariff prescribed by FPC in its Order of Oct. 27, 1949 to carry out its Opinion and Order 173 of Jan. 5 1949, and consisting of only the valid rate and service provisions of the Baltimore Contract as modified by FPC, was automatically annulled simultaneously with the contract invalidation. The dissent below of Miller, J., adopts, and is based on this very *non sequitur*. He there states: "But the Commission has ordered the two companies to continue to observe and be governed by all the provisions of the old contract which are 'in and of themselves lawful,' — a qualification which overlooks the fact that the Fourth Circuit condemned the contract in its entirety."

Although the Fourth Circuit struck down the entire contract, it "condemned" only Articles IV and V.

c. The question ignores the fundamental difference between FPC's ordering the continued performance of a private *contract* and its prescribing of a rate and service *tariff*.

d. The question (in asserting an illegal compulsion by FPC of "continued performance") ignores the plain direction to the Petitioners by FPC three years ago,[6] and by the Court below, to utilize the administrative remedies which are now and have at all times been available to Petitioners to change Penn Water's rate and service tariffs by the only method prescribed and permitted by the Federal Power Act. Penn Water denied that such administrative requirements applied to it (R., Vol. XVI, pp. 401 et seq.), and thus far has refused to avail itself of that remedy. Instead, it prosecutes this effort to strike down *ab initio*, by a collateral attack to which FPC was not a party, the rate reduction order of FPC applicable to services already actually rendered. Petitioners have not exhausted their administrative remedies.[7]

e. The question incorrectly asserts that FPC compelled an illegal method of rate payment, which Petitioners improperly label "revenue pooling." Because of Petitioners' inability to demonstrate that FPC prescribed performance of Articles IV and V of the Baltimore Contract, they endeavor to show that the payment provisions, which admittedly were ordered by FPC, are illegal. These payment provisions effect no pooling or sharing of revenue. This same argument was unsuccessfully made below and before the Fourth Circuit, but neither the Court below nor the Fourth Circuit at any time has regarded these provisions as illegal revenue pooling.

f. The question ignores the fact that the orders of FPC were expressly based on the continuing *physical operation* of a physically unified interstate power system. This

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[6] Opinion 173-A (R., Vol. XVI, p. 372).

[7] Federal Power Act, Sections 205 & 206, 16 USCA, Sections 824d & 824e.

physical system operation has been unanimously commended by Commissions and Courts alike.[8] Such unified physical operation has in fact, continued down to the present.

From the foregoing, it is apparent that the orders of FPC here under attack do not purport to "compel" Penn Water or any other electric utility to "perform" any illegal contract or to do any illegal act, nor were those orders "based upon" the "continued performance" of any illegal contract or any illegal act. The Fourth Circuit underlined this fact by saying with respect to this very Baltimore Contract, "It is obvious that the Commission did not prescribe the restrictive conditions of the contract as part of the rate order * * *".[9]

This "primary issue" (as alleged by Petitioners) may be properly raised only after (a) Penn Water has first exhausted its administrative remedies, and then only (b)

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[8] *Safe Harbor Water Power Corporation v. FPC*, 179 F. 2d 179 (1949); Fourth Circuit Opinion in *Baltimore Contract* case, *supra*, Footnotes 4 & 5, at p. 566, "We do not venture to say that the physical connection of the facilities of the two utilities, and the interchange of electric power produced by water in Pennsylvania and steam in Maryland is not a desirable utilization of their combined resources."; Fourth Circuit Opinion in *Safe Harbor Contract* case, *Cons. Gas Elec. Lt. & Pr. Co. of Balto., et al. v. Penn Water, et al.* (Jan. 3, 1952), copies supplied Court by Petitioners, pp. 12-13; FPC Opinion 173, Record, Vol. XVI, pp. 39, 43, "Operations * * * are closely integrated and coordinated as a matter of economy, efficiency, flexibility, and maximum utilization of hydro capabilities."; FPC Opinion 173-A, Record, Vol. XVI, pp. 372, 378, "precisely what was sought to be encouraged and fostered by the Federal Power Act and established as a part of the criterion of the public interest to be served by regulation thereunder"; and see testimony of Penn Water's Officers, Record, Vol. I, pp. 23-27; 31-32; 36-38; 74-75.

[9] *Consolidated Gas Electric Light and Power Company of Baltimore and Public Service Commission of Maryland v. Pennsylvania Water & Power Company and Pennsylvania Public Utility Commission*, USCA 4th, January 3, 1952, not reported.

if, thereafter, FPC actually does prescribe the illegal compulsions now incorrectly ascribed to it by Petitioners. This question presents no conflict between the Circuits *in this case* because neither Court had that issue before it. It presents no adequate ground for the granting of certiorari *in this case.*

STATEMENT

A. FPC Reduced Penn Water's Rates Approximately $2,000,000.

On petition of the Public Service Commission of Maryland (Maryland Commission), the City of Baltimore, and others, FPC on September 1, 1944 (over seven years ago) instituted an investigation of the rates charged to Consolidated by Penn Water and Safe Harbor Water Power Corporation (Safe Harbor) (R., Vol. XVI, p. 31). The latter two companies are Pennsylvania hydroelectric companies which sell only at wholesale. Penn Water also has a small amount of steam-electric generation. Safe Harbor is owned ⅔ by Consolidated and ⅓ by Penn Water, and under its FPC tariff sells its entire output to those two companies in that proportion.

The Safe Harbor rate case was tried first. On November 4, 1946, FPC reduced Safe Harbor's rate of return to 5% and its annual rates to its two customers by about $600,000. The question of whether a Part I "licensee" and Part II "public utility" could be regulated under Part II of the Federal Power Act was answered by FPC in the affirmative in that case. The Third Circuit affirmed on December 30, 1949, *Safe Harbor Water Power Corporation v. FPC,* 179 F. 2d 179, and certiorari was denied on May 15, 1950, 339 U. S. 957.

Trial of the Penn Water rate case began April 15, 1946, and concluded July 16 of the following year. It produced

a record of 26,000 pages of testimony, and at no time during that protracted hearing did Penn Water challenge the validity of any of its contracts. By its Opinion No. 173 and Order of January 5, 1949 (R., Vol. XVI, pp. 39, 177), FPC reduced Penn Water's rate of return to 5¼%, and its annual rates by $1,954,261, based on 1946 operations.

B. Penn Water Thereupon Unilaterally Altered Its Services and Contracts.

On January 28, 1949, Penn Water filed its Petition for Rehearing (R., Vol. XVI, p. 192), objecting "to virtually every statement, finding and requirement of that opinion and order" (R., Vol. XVI, p. 372). Its main contention was "that since the record before the Commission was closed there have been substantial changes in the operations and contracts of Petitioner Penn Water, * * * so that the bases for the said Order * * * are destroyed * * *" (R., Vol. XVI, p. 374). This contention by Penn Water, that the FPC Rate Reduction Order had been rendered entirely nugatory, referred to unilateral action by Penn Water, first, in physically disrupting the interstate, integrated system operations on January 26, 1949 (two days prior to its Petition for Rehearing)[10] and, second, in renouncing and instituting suit on December 21, 1948, against Consolidated to invalidate the long-term contract between Penn Water

[10] This physical throwing of switches, "splitting of buses," and similar radical departures from long-established system operating procedures was directed by a 14-page "Operating Order" issued by Penn Water to its and Safe Harbor's operators. It jeopardized the safety of Consolidated's expensive equipment in Baltimore and threatened the continuity of service in the Baltimore and Washington areas. This danger forced Consolidated and the Maryland Commission to seek injunctive relief in the United States District Court for the District of Maryland. It was this physical disruption of operations, and this alone, to which the injunction granted by that Court was directed. Penn Water has not again resorted to such action since that injunction was dissolved on mandate of the Fourth Circuit on January 17, 1951 (R., Vol. XVI, pp. 382-383).

and Consolidated of June 1, 1931 (the Baltimore Contract) under which Penn Water, prior to the enactment of the Federal Power Act of 1935, had contracted to sell power to Consolidated. This Contract had been filed by Penn Water with FPC on January 13, 1936 (pursuant to Section 205(c) of the Federal Power Act, U. S. C., Title 16, Sec. 824(d)(c)), as Penn Water's filed tariff prescribing its rate and service to Consolidated. FPC was not made a party to this suit.

C. FPC Directed Penn Water to Comply with Administrative Requirements of the Federal Power Act.

On February 28, 1949, FPC entered its Opinion 173-A and order denying Penn Water's Application for Rehearing (R., Vol. XVI, p. 372). In that Opinion, FPC pointed out that any unilateral change by Penn Water in such physical operations would constitute a change in its services and rates to Consolidated which could be accomplished only by compliance with the procedural requirements of the Federal Power Act through the filing by Penn Water of amended tariffs, and concluded, "None of these alleged changes having been made or proposed in the only way they could lawfully become effective, Respondents are in no position in this or any other proceeding to urge any objection or claim in reliance thereon." FPC further pointed out that if such changes "occurred before our order was issued Respondents cannot, on the allegations they have made, complain *in this proceeding* of our failure to hear matters which they failed to bring to our attention by timely application." (P. 382. Emphasis added.)

The Commission thereupon properly refused to consider *in this proceeding* this last-minute collateral attack by Penn Water in its effort to nullify the FPC tariff and thereby still further delay the major rate reduction "already long overdue." The Commission, however, carefully directed Penn

Water's attention to the appropriate and necessary administrative procedure under the Federal Power Act whereby any challenge to the tariff could be considered by the Commission.[11] Instead of responding to this suggestion and properly pursuing their administrative remedies, Petitioners actively prosecuted the collateral action in the United

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[11] On this point, the Commission in its Opinion 173-A of February 28, 1949, said (R., Vol. XVI, 372, at pp. 380 et seq.):

"Furthermore, our rules (Sections 35.5) require that when a rate or service which has been filed with the Commission, as these foundation contracts have been, 'is proposed to be cancelled and no new rate schedule is filed in its place * * * each public utility required to file the schedule shall formally notify the Commission of the proposed cancellation' 30 days in advance and shall submit a statement of the reasons therefor and that notice has been served upon the other parties to the schedule or contract. A copy of such notice to the Commission is required to be duly posted.

"Compliance with filing requirements is particularly important in a case like the present where the filings cover, not a single sale and delivery by one party to the other, but interchange of energy and capacity between and among the parties to the contracts and numerous other obligations and rights which are required to be filed as changes under Section 35.3(c).

"* * *

"If such changes insofar as they affect rates charged Baltimore Company by Penn Water are to be legally effectuated under Section 205(d) of the Act, that can only be done by filing as prescribed in our rules. This will afford 30 days opportunity for examination of the changes before they become effective. If questionable, they are subject to suspension pending hearing and decision, under Section 205 of the Act. If at such a hearing it should appear that the changed rates to Baltimore Company are unjust or unreasonable (as a result of Penn Water's failure to utilize the more economical modes of operation previously followed or for any other reason), or that they are unduly discriminatory or preferential (because of an unreasonable difference between localities, or otherwise), the Commission may refuse to permit them to become effective insofar as they cover the services continued to be rendered by Penn Water to Baltimore Company.

"Insofar as such changes affect service, compliance with the Rule referred to would enable the Baltimore Company, the Maryland Public Service Commission, or any other interested electric utility or state commission, before such changes are put into effect to make application under Section 202(b) for an order 'to sell energy

States District Court for the District of Maryland to strike down the Baltimore Contract. They then sought to exploit their collateral attack by motions to annul or remand (filed in the instant proceeding at the last hour after main briefs were in and the case ready for argument). The Court below, however, in the Opinion here sought to be reviewed, yet again pointed out to Petitioners the necessity for exhaustion of their administrative remedy.[12] It is submitted that the Court below was correct, and that this case is not ripe for certiorari until after the administrative remedy has been exhausted.

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* * * or exchange energy' from and after the time of the proposed change or termination of service, or a complaint under Section 207 as to the adequacy of the service to be rendered.

"None of these alleged changes having been made or proposed in the only way they could lawfully become effective, Respondents are in no position in this or any other proceeding to urge any objection or claim in reliance thereon. An unlawful attempt to avoid putting into effect the rate reduction we ordered affords no valid basis for objecting to that order."

[12] "* * * if petitioners, *as a result of the Fourth Circuit's decision*, wish to make any changes in operations, *contracts*, arrangements, etc. within the jurisdiction of the Federal Power Commission, they must do so in accordance with the Federal Power Act (cf. *Michigan Consol. Gas Co. v. Panhandle Eastern Pipe L. Co.*, 173 F. 2d 784, 788-789 (6th Cir., 1949)). Under Section 205(d) thereof, 'Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, *or contract relating thereto*, except after 30 days' notice to the Commission and to the public' (16 U. S. C. Sec. 824d (d)). Pursuant to that section, petitioners may submit new *arrangements* and rates based thereon to the Commission. And the Commission 'either upon complaint or upon its own initiative without complaint' may 'enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service * * *.' (Sec. 205 (e), 16 U. S. C. Sec. 824d (4)). If Penn Water feels itself aggrieved *after* such proposed changes *have been acted upon by the Commission*, it may *at that time* bring a new petition for review. In short, a 'rate established in the mode described should be deemed the legal rate and obligatory alike upon carrier and shipper until changed in the manner provided' by the statute. *(Robinson v. Baltimore & Ohio R. R.*, 222 U. S. 506, 510 (1912))." (R., Vol. XVIII, pp. 54, 55. Emphasis added).

D. Instead of Complying with FPC's Directions, Penn Water Attacked the Baltimore Contract in a Private Suit.

Instead of changing its services and rates by the appropriate administrative procedure, Penn Water prosecuted its private suit against Consolidated in the United States District Court for the District of Maryland to strike down the Baltimore Contract and by such collateral attack to annul the FPC rate reduction order *ab initio*. FPC was not a party to this suit.

On March 18, 1950, the District Court sustained the validity of the Baltimore Contract. *Pennsylvania Water & Power Company v. Consolidated Gas Electric Light and Power Company of Baltimore*, 89 F. Supp. 452.

On Penn Water's appeal, the Fourth Circuit reversed the District Court and, passing only on the face of the Contract, invalidated it.

E. The Fourth Circuit Invalidated the Baltimore Contract Only Because of the Restrictions of Articles IV and V Thereof.

The Fourth Circuit found that two, and only two, provisions of the Baltimore Contract were invalid (R., Vol. XVIII, p. 1 et seq.). These were Article IV, which restricted Penn Water's contracts with others, and Article V, which restricted Penn Water's physical expansion. As above noted, the FPC orders here under attack are not dependent on or related to these two restrictions, and do not require compliance therewith by Penn Water.

The Fourth Circuit's finding that the invalidity of the Baltimore Contract was confined to Articles IV and V is clearly shown from the following excerpts from its Opinion:

"The restrictions which are imposed upon the activity of Penn Water by the agreement and *give rise*

to the contention of invalidity are contained in *Articles IV and V* as follows:

"Article IV. So far as possible consistently with the performance of any duty or obligation to serve imposed on Power[13] by its charter or otherwise by law, Power shall obtain the approval of Electric before entering into any agreement or agreements with any other person or corporation for the sale and/or purchase and/or interchange of electrical and hydraulic power and energy, or before making any substantial modifications in the existing contracts now in force between Power and its customers other than Electric.

"Article V. So far as possible consistently with the performance of any duty or obligation aforesaid, Power shall obtain the approval of Electric (1) before incurring any single commitment for investment (except for renewals or replacements) in excess of $50,000.00 on the basis of which Electric shall make payment under Article III(b) hereof, and (2) before alienating or disposing of in any one year any property, plant, or equipment, other than stores and construction equipment, having a total value in excess of $50,000.00 and included in the investments of Power and/or subsidiaries of Power in plant, property or power development devoted to the generation, transmission, or distribution of electrical power and energy.

"* * *

"The District Judge found and it is not disputed that *the effect of the quoted provisions of Articles IV and V* of the contract is to confer upon Consolidated the power to control (1) the prices at which Power may sell its product; (2) the extent to which Power may extend its plant; (3) the territory in which Power may sell its product; and (4) the amount of back feed energy which Power must purchase from Consolidated.

[13] "Power" designates Penn Water and "Electric" designates Consolidated.

"We are in agreement with this interpretation of the contract. * * *

"* * *

"There can be no doubt that the freedom of action of Penn Water as a public utility of the state has been and is restricted *by the provisions of Articles IV and V* of the basic agreement whereby Penn Water is required to get the approval of Consolidated before making any agreement for the purchase or sale of electric power or making any investment or disposition of any property in excess of $50,000." (R., Vol. XVIII, pp. 7, 8, 25. Emphasis added.)

In its Opinion on Motion to Interpret Mandate the Fourth Circuit, after describing with approval the payment and other provisions of the Contract, again emphasized that only Articles IV and V of the Contract were illegal by saying:

"* * * Closely associated with these provisions were *the illegal restrictions* on the future activities of Penn Water *which resulted in the invalidation of the whole contract. Therein* Penn Water was required to obtain the approval of Consolidated before entering into any agreement for the sale or purchase of electric power and energy and to obtain the approval of Consolidated before making any investment or disposing of its property having a value in excess of $50,000. These restrictive conditions were included in order to safeguard Consolidated in the performance of its promises and it is conceded that without them the *contract* would have been impracticable and would not have been made. * * *" (R., Vol. XVIII, 35, at p. 37. Emphasis added.)

After thus finding that the *only* illegality in the Baltimore Contract was in Articles IV and V thereof, the Court found that those two Articles provided an essential *contractual* protection to Consolidated against the heavy open-end obligations imposed on Consolidated by the Contract,

and, because of their inseparability from the rest of the Contract, struck the entire Contract down. As noted above, the Baltimore Contract was executed before the enactment of the Federal Power Act, before Consolidated had the regulatory protection now afforded by such Act and when, therefore, the *contractual* provisions of Articles IV and V were its sole protection.

The finding that only Articles IV and V were illegal was again confirmed by the Fourth Circuit when, in its January 3, 1952 Opinion in the Safe Harbor contract case, it referred to its Baltimore Contract Opinion and said (pp. 3-4):

> "* * * We there held that the contract between Consolidated and Penn Water, then in suit, which for convenience may be called the Penn Water Contract, was invalid, because *Articles IV and V of the basic agreement* of June 1, 1931 conferred upon Consolidated the power to control: (1) the prices at which Penn Water might sell its product; (2) the extent to which Penn Water might extend its plant; (3) the territory in which Penn Water might sell its product; and (4) the amount of back feed energy which Penn Water must purchase from Consolidated. *These restrictions*, we concluded, *invalidated the contract* * * *." (Emphasis added.)

The Court below is thus obviously correct when it observes that the Fourth Circuit "issued a judgment declaring *certain phases* of the contractual arrangement between Penn Water and Consolidated illegal * * *."

Petitioners contend that since both the valid and invalid provisions of the Baltimore Contract were stricken down by the Fourth Circuit in their entirety *qua contract*, the provisions of the tariff prescribed by FPC, *qua tariff*, otherwise entirely valid, must likewise succumb. This is the fatal *non sequitur* of Petitioners' case.

F. Upon Invalidation of the Baltimore Contract, Penn Water Moved the Court Below to Annul the FPC Rate Reduction Order.

The FPC-Penn Water rate reduction order, effective February 1, 1949 (R., Vol. XVII, p. 58) was awaiting argument on appeal before the Court of Appeals for the District of Columbia Circuit when, on December 11, 1950, the Supreme Court of the United States denied certiorari in the Baltimore Contract case in the Fourth Circuit. On December 29, 1950, Penn Water filed its motion in the Court below to annul the rate reduction order because of the Fourth Circuit's invalidation of the Baltimore Contract. It is this motion, and the lower Court's denial thereof, which is of primary significance in the Petitions herein.

ARGUMENT

A. The Court Below Properly Denied the Motion to Annul the FPC Rate Reduction Order.

1. Because Petitioners Have Not Exhausted Their Administrative Remedy.

The Court below made the sound procedural determination, under established administrative law,[14] that Petitioners could not present to the Court of Appeals for the first time, as a basis for vacating the FPC's rate reduction orders, questions which Petitioners had ignored during the course of the lengthy hearings before the Commission, which they had subsequently made the basis of a collateral Court proceeding to which FPC was not a party, and as to which the Federal Power Act prescribes a proper procedure for presentation in the first instance to the Commission.

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[14] *Macauley v. Waterman S. S. Corpn.* (1946), 327 U. S. 540; *Aircraft Diesel Equipment Corpn. v. Hirsch* (1947), 331 U. S. 752; *Myers v. Bethlehem Shipbuilding Corpn.* (1938), 303 U. S. 41; *FPC v. Metropolitan Edison Co.* (1938), 304 U. S. 375.

2. Because the FPC Rate Reduction Order Compelled No Unlawful Act.

a. FPC Did Not Compel Performance of Any Illegal Act or Contract Provision.

By its order of October 27, 1949 (R., Vol. XVII, p. 46), rejecting as improper rate schedules filed by Penn Water, purportedly in compliance with the original FPC rate reduction order, FPC prescribed the new rates to be collected by Penn Water, and again made it clear that its order did not attempt to validate any provisions of the Baltimore Contract which might later be invalidated in the then-pending litigation in Baltimore to which FPC was not a party.

It did this (R., Vol. XVII, p. 62) first, by prescribing as tariffs only those provisions of the Baltimore Contract *"in and of themselves lawful,"* thereby automatically excluding from its order any provisions which might be found unlawful "in and of themselves."

It did this, secondly, by prescribing as tariff provisions only those lawful provisions of the Baltimore Contract *"prescribing or defining the power, energy and transmission services to be furnished, or any classification, practice, regulation or rule affecting such services * * *."* Articles IV and V of the Baltimore Contract do none of these things, and they were thereby specifically excluded from the FPC order regardless of the subsequent determination of their validity or invalidity.

Neither the Court below nor the Fourth Circuit found that FPC had purported to validate or prescribe performance of either Article IV or Article V of the Baltimore Contract. In the Baltimore Contract case, the Fourth Circuit said with respect to the Opinion and order of FPC: "The restrictive provisions of the agreement were not men-

tioned and their legal validity was not discussed." (R., Vol. XVIII, p. 22). Indeed, in its recent Safe Harbor Contract Opinion (p. 15), the Fourth Circuit affirmatively states with reference to the *Penn Water* FPC rate reduction order, "It is obvious that the Commission did not prescribe the restrictive conditions of the contract as part of the rate order * * *."

b. FPC Based Its Orders on the Continuing Physical Operations of an Interstate Power System.

In its Opinion 173-A and Order denying Penn Water's Application for Rehearing (R., Vol. XVI, p. 372 at p. 378), FPC described the physically unified interstate operations of Penn Water — as testified to by Penn Water's own officers — as being not only legal but commendable, and "precisely what was sought to be encouraged and fostered by the Federal Power Act * * *." (This unified integrated interstate operation has continued on down to the present, irrespective of contract invalidation.) It pointed out that questions as to the legality of the Baltimore *Contract*, then in litigation, could not affect the validity of the Commission's *Order* which was directed to the "continuation of the *operation* of the integrated and interconnected system," that is, to the *physical operation* of an interstate system.

Thus, the Court below said (R., Vol. XVIII, at p. 54):

> "It is those services and rates, reflecting *underlying operations* which were the subject of the Commission's order." (Emphasis added.)

c. FPC Did Not Prescribe "Revenue Pooling"

Penn Water's Petition contains a score of references to alleged illegal "revenue pooling" and "division of earnings" which it contends were "compelled" by FPC. By its very terms, the concept of "revenue pooling" contemplates a joint pooling or combining of revenues and a division or

sharing of the total. Under neither the Baltimore Contract nor the FPC Order is any pooling of revenues prescribed. This same attack was leveled at the Baltimore Contract before the Fourth Circuit. It was leveled at FPC's order before the Court below. It was also leveled at the Safe Harbor Contract before the Fourth Circuit. Petitioners, however, cannot point to a single holding or inference in any of the Opinions in these cases that the payment provisions ordered by FPC are invalid either as "revenue pooling" or otherwise. On the contrary, the Fourth Circuit, both in its Opinion in the main Baltimore Contract case, and in its Opinion on Penn Water's Motion to Clarify the Mandate in that case, described in detail the payment provisions of the Baltimore Contract with unquestioned approval, and clearly separated them from the illegal restrictions which invalidated that Contract. At this point, Penn Water's Petition (p. 9) again takes recourse to its fundamental *non sequitur* by saying:

> "It is thus clear that the FPC specifically ordered the continuance of the illegal revenue pooling provisions of the Baltimore contract.
>
> "While the Fourth Circuit did not specifically refer to these provisions in declaring the contract illegal it did declare the entire contract invalid * * *."

If Penn Water desires to change the payment provisions of the tariff prescribed by FPC, it may do so only through the appropriate and requisite administrative process.

d. FPC Did Not Base "Critical Features" of its Rate Reduction Orders on Continuance of the Baltimore Contract.

Penn Water's Petition, on this ground, challenges the validity of FPC's order with respect to rate of return, jurisdiction over Penn Water, and allocation of the rate reductions.

(1) The 5¼% Rate of Return.

The Court below (R., Vol. XVIII, p. 66) found that this rate of return was "designed to provide 3.17% for bonds, 5.21% for preferred stock and 8.64% for common stock and surplus and was 'fair' "; that it was based on "substantial evidence," and that it met "the test laid down in the *Hope* case." FPC there denied any "assumption" by it that the Baltimore Contract would be "continued" and asserted that this rate of return "was independently bottomed on the 'end result' test." The adequacy or fairness of this rate of return is not dependent on continuance of any contract. It relates to conditions actually existing during the period in which service was rendered under these rates. If Petitioners contend that this rate of return is now improper, they have their administrative remedy on full hearing before the Commission. The determination of rate of return should not be annulled because of a collateral attack in which it was not even considered.

(2) Jurisdiction of FPC Over Penn Water.

The Court below correctly affirmed FPC's assertion of jurisdiction on the basis of physical operations of the unified interstate electric system. These operations have continued despite invalidation of the Baltimore Contract and do not depend on its existence. No record citation is or can be given by Penn Water in support of its contention (Pet. No. 428, p. 14) that the existence of the interstate pool operations depends upon any illegal contractual provisions.

FPC has asserted that the Commission's jurisdictional findings "were based on the actual operations taking place and not upon the existence of any assumed contractual obligation to conduct such operations." FPC further asserted that its orders "were based upon a consideration of physical

facilities and electrical operations resulting in the service then being rendered * * *; were in no way dependent upon the restrictive conditions of the contract, or any assumed legal effect of the contract," and that the very services over which jurisdiction was so asserted have continued on down to the present and that such operations are "completely interstate in character." Penn Water's statement (Pet. No. 428, p. 14) that the existence of the interstate system depends on the illegal contracts is disproved by the continued operations of the system despite the non-existence of the Baltimore Contract. These operations continue because of the immutable laws of physics operating on existing interconnected generating and transmission facilities.

If Petitioners desire to reduce or terminate FPC jurisdiction over these operations, they may do so only by changing the operations pursuant to the administrative requirements of the Federal Power Act.

(3) Allocation of Rate Reductions.

The entitlements to which Petitioners object are those provided for by the tariff filed by Penn Water itself. They form an integral part of the tariff rates and are "in and of themselves lawful." Because they form a part of the tariff rate they likewise may not be changed except in conformity with administrative requirements.

The Court below amply disposed of this argument by Part V of its Opinion (R., Vol. XVIII, p. 69), and (at p. 71) found that "the conclusions of the Commission on this point are proper and are supported by substantial evidence."

B. Under the Facts of this Case, the Opinion of the Court Below is Not in Conflict with the Opinion of the Fourth Circuit in the Baltimore Contract Case.

Petitioners assert "direct conflict" between Circuits on the so-called "primary issue" but, as shown above, the record in this case does not properly present that issue. It was not ripe for decision and the lower Court did not decide it. It was not presented to the Fourth Circuit in the Baltimore Contract case.

After an extensive quotation from the FPC's Opinion No. 173-A, defining the physical operations covered by its order, the Fourth Circuit said:

> "This view of expert government authority is entitled to respect and we do not venture to say that the physical connection of the facilities of the two utilities, and the interchange of electric power produced by water in Pennsylvania and by steam in Maryland is not a desirable utilization of their combined resources. Nor do we undertake to gainsay the view of the Commission that *even if the restrictive conditions of the basic contract are invalid*, as to which the Commission expressed no opinion, it still has the *duty and authority* under the Federal Power Act to encourage and *establish the interconnection* of electrical facilities of regional districts if it finds that such action is necessary and appropriate in the public interest, and will not interfere with the lawful authority of the state commissions in respect to the generation and distribution of electrical energy in intrastate commerce. Sections 201, 202(a)(b), 16 U. S. C. A. Sections 824, 824a (a)(b)." (R., Vol. XVIII, pp. 23-24. Emphasis added.)

As to this, the lower Court said:

> "In our view, the Fourth Circuit's opinion neither purported to nor did relieve Penn Water from its obligation under the Federal Power Act to continue the

then existing services and rates. It is those services and rates, reflecting underlying operations, which were the subject of the Commission's order." (R., Vol. XVIII, p. 54.)

This language as to the effect of the FPC order clearly presents no conflict. Nor is there any conflict on the question of whether Penn Water's application to FPC for rehearing was properly denied. In fact, the Fourth Circuit took pains in its Safe Harbor Contract Opinion to point out (p. 3) that "* * * we are not engaged in the review of the enforcement of an order of an administrative board or commission." Nor was that Court so engaged in the Baltimore Contract case.

Assuredly, there is no conflict with the holding of the lower Court that the anti-trust question had not been timely raised.

There is no conflict as to the holding of the lower Court that the regulatory provisions of Part II apply to Penn Water as a "public utility" under that section of the Federal Power Act notwithstanding the fact that it is also a "licensee" under Part I. This holding is in complete agreement with an identical ruling of the Third Circuit in the Safe Harbor rate case.[15]

There is no conflict between Circuits on the holding of the lower Court that all of Penn Water's sales of energy were subject to FPC jurisdiction. This holding is in complete agreement with an identical ruling of the Third Circuit on substantially identical facts in the Safe Harbor rate case.[16]

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15 & 16 *Safe Harbor Water Power Corp. v. Federal Power Comm.*, *supra* n. 2.

There is no conflict as to the lower Court's holdings regarding Penn Water's rate base, rate of return, or allocations.

There is no conflict as to the lower Court's holding that Safe Harbor sells its entire output ⅔ to Consolidated and ⅓ to Penn Water. In fact, the Fourth Circuit in its most recent decision in the Safe Harbor contract case said (at pp. 4-5), "These two utilities are its only customers under an arrangement approved by the Pennsylvania Commission."

There is no conflict as to the lower Court's holding that the Petitioners have not exhausted their administrative remedy.

The Petitioners, in an effort to create a conflict between Circuits, have, in fact, distorted the holding of the lower Court. Their statement at page 5 of Penn Water's Petition (No. 428) that "* * * the D.C. majority held in effect that 'antitrust criteria' (R., Vol. XVIII, p. 55) do not apply to orders of the FPC * * *"; the statement on page 12 of that Petition that "* * * the D.C. majority has upheld the FPC orders on the ground that 'antitrust criteria' are not applicable"; and the reference on page 15 of the same brief to the lower Court's "decision that the FPC may exempt the * * * contracts from the antitrust laws" misrepresent the language of the lower Court's Opinion.

The Petitioners' motion to annul FPC's rate order was actually denied by the lower Court on the ground that Petitioners had not exhausted their administrative remedy. Preliminary to such ruling, however, and in response to the contentions made in such motions, the lower Court discussed the relationship between the Federal Power Act and the Federal antitrust laws. It thereby indicated its dis-

agreement with Petitioners' arguments as to the comprehensive and overriding effect of the Fourth Circuit's Opinion. The lower Court thereby reconciled its position *in this case* with that of the Fourth Circuit. *In this case*, no conflict between Circuits arises from this discussion because FPC carefully refrained from ordering the performance of any act which, *qua* contract, would violate the Sherman Act. The Court therefore made no definitive judgment on this concept, and carefully pointed out that before such a decision could be made, the actual issue must first be properly raised in appropriate proceedings under the Federal Power Act.

This discussion was not essential to the operative decision of the lower Court. It here presents, at most, an incipient difference of thinking between the Court below and the Fourth Circuit on a question not presented to either Court or decided by either. This incipient difference in thinking became more apparent in the recent decision of the Fourth Circuit in the Safe Harbor Contract case, which was, however, decided on an entirely different record. In the Safe Harbor case — quite contrary to the present case — FPC contends that it *did* prescribe restrictions which the Fourth Circuit found to be invalid *qua* contract. Petitioners' efforts to create a conflict between Circuits *in this case* present no grounds for the issuance of certiorari. The Fourth Circuit's Opinion in the Safe Harbor Contract case rendered January 3, 1952, may present such a conflict as to warrant the granting of certiorari *in that case*.

CONCLUSION

It is submitted that the judgment of the Court below, which affirmed the orders of the Federal Power Commission, should not be reviewed by certiorari here, unless the Court below made an error of law in its construction of the Federal Power Act, and the Commission's authority thereunder, under the Constitution and Laws of the United States. No such error appears from the Petitions.

It is respectfully submitted that the Petitions should be denied.

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January 23, 1952.